STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2005
v	No. 251929 Livingston Circuit Court
CRAIG MICHAEL HASKELL, Defendant-Appellant.	LC No. 02-013073-FC

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), one count of second-degree CSC, MCL 750.520c(1)(f), and aggravated domestic violence, MCL 750.81a(2), for beating and sexually assaulting his former girlfriend after she refused to rekindle their relationship. We affirm.

On appeal, defendant argues that the trial court erred several times concerning the admission of evidence. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant first claims that the trial court abused its discretion by excluding as hearsay defendant's statement to his mother about hearing voices immediately after returning from the victim's home on the night of the incident because that statement constituted an excited utterance. We disagree.

MRE 803(2) allows admission of a statement otherwise excluded as hearsay when the statement is an excited utterance, which is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Defendant argues that, pursuant to *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), citing *People v Straight*, 430 Mich 418, 424-425; 424 NW2d 257 (1988), the statement need no longer relate to the startling occasion to be admissible. This argument is wholly without merit. See MRE 803(2); *Smith*, *supra*.

The startling event in this case was defendant suddenly seeing the victim bruised and bloody; therefore, we agree with the trial court's determination that defendant's subsequent

statement, "I hit her," resulted from this event. However, it does not follow that defendant's statement, "make the voice stop," was a result of seeing the victim bruised and bloody, but, rather, a result of hearing voices. Therefore, the trial court did not abuse its discretion in excluding the statement.

Defendant's remaining evidentiary issues are unpreserved. When an unpreserved issue is reviewed for plain error affecting substantial rights, reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant asserts that the trial court plainly erred in admitting false testimony from the prosecutor's expert witness. We disagree that the testimony was false or that the trial court erred in admitting it. Defendant essentially argues that the prosecutor's expert's testimony concerning the effect of a complex partial seizure was incorrect as a matter of medical fact. However, defendant misconstrues the prosecutor's expert's testimony. The expert did not testify that someone experiencing a complex partial seizure would still be in control and cognizant. In fact, during cross-examination she admitted that someone experiencing a seizure may not appreciate the wrongfulness of their behavior, may not be able to conform their actions to the law, and may not remember what happened during a seizure. Instead, the prosecutor's expert testified that, after reviewing the information concerning defendant's actions before, after, and *during* the assault, she found nothing to suggest that *defendant* was not cognizant of what was happening or was unable to control his actions. This testimony supports a finding that, even if defendant suffers from the disorder, she found nothing to suggest that defendant was suffering from an actual seizure at the time of the assault. The trial court did not err.

Defendant next asserts that the trial court plainly erred in admitting the prosecutor's expert's testimony stating her opinion concerning defendant's mental cognizance and capacity for control at the time of the assault. We disagree. MRE 704 provides, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Michigan case law specifically states that an expert testifying in a criminal case can give an opinion as to whether a defendant is able to conform his conduct to the requirements of the law and whether he is mentally ill or insane. *People v Caulley*, 197 Mich App 177, 193; 494 NW2d 853 (1992). Therefore, defendant has failed to show plain error through the admission of such opinion testimony.

Defendant next asserts that the trial court plainly erred in admitting the prosecutor's expert's testimony in which she read portions of the victim's hearsay statements to police. We disagree. Under the version of MRE 703 in effect at the time of defendant's trial**,** an expert witness may base his or her opinion on hearsay evidence. *Caulley, supra* at 194-195. Furthermore, this evidence was admissible at the discretion of the trial court and we decline to disturb a trial court's admission of such evidence through MRE 703 absent an objection based upon unfair prejudice, MRE 403. See *id*. at 195. Therefore, under the version of MRE 703 in effect during defendant's trial, the trial court had discretion to allow the prosecutor's expert to include in her testimony those portions of the victim's statements to police which she relied on in forming her expert opinion. Furthermore, the admission of this testimony did not violate defendant's right to confront his accuser where the victim was available to testify. See *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Next, defendant asserts that the trial court plainly erred in replaying the taped testimony of the prosecutor's expert when requested by the jury without also replaying the testimony of defendant's expert. We disagree. Defendant did not object to the replay of the testimony of the prosecutor's expert and, in fact, indicated his approval of the trial court's handling of the request both before and after the replay; therefore, defendant has waived this issue on appeal. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Because defendant waived this right, there is no error to review. See *id*. at 219. Regardless, MCR 6.414(H) indicates that the trial court is not to refuse a reasonable request of the jury and Michigan law does not require that portions of testimony other than what is requested be read or replayed as well. See *People v Howe*, 392 Mich 670, 675-676; 221 NW2d 350 (1974).

Next, defendant argues that the trial court abused its discretion in refusing to sequester the prosecutor's expert to prevent her from listening to defendant's expert's testimony. We disagree. "The decision whether to order the sequestration of a witness is left to the discretion of the trial court." *People v Jehnsen*, 183 Mich App 305, 309; 454 NW2d 250 (1990).

The prosecutor requested that her expert witness be allowed to listen to defendant's expert because he had not prepared a report concerning defendant's insanity defense. All discussions concerning the sequestration of witnesses, including the prosecutor's request for her expert to listen to defendant's expert's testimony, took place outside the jury's presence. Furthermore, defendant's argument that the prosecutor's expert had no need to listen to his expert because she had all of his notes, diagnosis, and medical records, fails to note the instances during defendant's expert's testimony in which the prosecutor notified the trial court that the expert was relying on information that had not been provided to the prosecutor. The trial court took a recess during the expert's testimony after a reference to a second report that had not been received by the prosecutor or her expert and specifically allowed the experts to compare their information to make certain that the prosecutor's expert actually had all of the information and did not need more time. Therefore, the trial court did not abuse its discretion by allowing the prosecutor's expert to listen to defendant's expert's testimony.

Next, defendant claims that the trial court made several instructional errors. After de novo review of the instructions in their entirety to determine if they fairly presented the issues to be tried and sufficiently protected defendant's rights, we disagree. See *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

First, defendant claims that the trial court erred in reading the whole of CJI 2d 20.9 to the jury when no evidence of several of the factors listed in the instruction for determining whether the victim suffered mental anguish was admitted during trial. Specifically, defendant argues that no evidence was presented that the victim needed psychological treatment or medication, that she was angry or that the emotional effects lasted a long time. However, the trial court instructed the jury that no single factor was necessary and that the list was not all inclusive. Regardless, the evidence admitted at trial that defendant beat the victim, leaving her bruised and bloody, and threatened to kill her parents and her if she screamed during the assault, was sufficient alone to satisfy the requirement of mental anguish. Therefore, defendant has failed to show how the inclusion of the standard list of factors to be considered when determining whether the victim suffered mental anguish was unfairly prejudicial to defendant.

Second, defendant claims that the trial court plainly erred by failing to properly instruct the jury regarding his insanity defense. We disagree. Defendant did not object to the insanity defense instruction challenged on appeal and, when given the opportunity to note any corrections needed to the instructions given, indicated his acceptance of the instructions; therefore, defendant has waived this issue on appeal. See *Carter*, *supra*. Because defendant waived this right, there is no error to review. See *id*. at 219. Regardless, pursuant to MCL 768.20a(3) [and MCL 768.36(1)], defendant has the burden of proving his defense of legal insanity by a preponderance of the evidence. *People v Carpenter*, 464 Mich 223, 231; 627 NW2d 276 (2001). Therefore, contrary to defendant's assertion on appeal, the instruction correctly advised the jury of the burdens of proof regarding defendant's legal insanity defense.

Third, defendant asserts that the trial court erred in reading a dictionary definition to the jury of the word "substantial" and claims that this definition was "probably misleading." However, defendant fails to explain how the definition given would be misleading. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority;" thus, the issue is abandoned. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Next, defendant claims that the prosecutor committed misconduct by arguing that the relevant area of expertise in this case was forensic examining rather than psychiatry and that the prosecutor's expert witness, a forensic psychologist, was better qualified to give an opinion as to defendant's ability to appreciate the wrongfulness of his conduct and control his actions than defendant's expert witness, a psychiatrist. We disagree. A claim of prosecutorial misconduct is a constitutional issue which is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, this issue is not preserved and, therefore, is reviewed for plain error affecting substantial rights. See *Carines*, *supra*.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Defendant's argument assumes that there was only one relevant area of expertise; however, the trial court specifically found defendant's expert to be qualified as an expert in psychiatry and the prosecutor's expert to be qualified as an expert in forensic examining. A prosecutor is allowed to argue, based on the facts, that one witness is more believable than another. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Therefore, the prosecutor was allowed to argue that, based on defendant's expert's lack of experience in making determinations specifically regarding the defense of legal insanity and the prosecution's expert's experience in making the same determination, that the jury should give the prosecution's expert's opinion more weight. Defendant has not only failed to demonstrate prosecutorial misconduct constituting plain error affecting his substantial rights, he has failed to demonstrate misconduct at all.

Defendant also asserts that the prosecutor committed misconduct during her rebuttal closing argument by stating that there really is no legal defense of insanity because such a defense depends on medical opinion testimony which can never be sufficient to establish the defense. We disagree that the prosecutor made such a statement. Defendant misconstrues the prosecutor's response to his counsel's statement during closing argument that the EEG completed on defendant showing abnormal activity was a physical test proving his condition. Taken in context, the prosecutor's remarks were an appropriate response to defendant's argument.

Next, defendant argues that he received ineffective assistance of counsel from Ronald Plunkett, the attorney that initially represented him, and from his trial counsel, Barry Resnick, for failure to object to the unpreserved errors addressed above. We disagree. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant first argues that his prior counsel, Ronald Plunkett, either misrepresented or lied to the trial court in chambers about a perceived threat regarding defendant and/or his family and that these misrepresentations resulted in defendant's bond being cancelled, precluded the performance of a diagnostic test to confirm defendant's expert's diagnosis, and precluded interviews of defendant by independent forensic psychiatrists or psychologists. We disagree. The trial court heard testimony regarding these statements on July 9, 2003, and found Plunkett's testimony credible that certain statements were made the night before he withdrew as defendant's counsel on May 19, 2003, which, at the time, led him to believe that there was a threat of violence. This Court must give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

Furthermore, defendant has failed to explain why the necessary tests and examinations could not be performed and offers no proof of an inability to complete these tests and examinations other than the affidavit of defendant's expert in which he avers that he "was told that examinations outside of the jail were not possible" and that his "efforts to seek addition [sic] neurological evaluation of [defendant] was not possible as a result of [defendant] being incarcerated." Furthermore, there is no indication in the lower court record that defendant moved the trial court for permission to complete these examinations between the time that Plunkett withdrew his representation until trial. Therefore, defendant has failed to show that completion of the desired tests and examinations were impossible because defendant was remanded to jail.

And, even assuming that such tests were impossible and assuming that such tests would confirm defendant's expert's diagnosis that defendant suffered from complex partial seizure, defendant has failed to show that the outcome of his case would have been different had such confirmation taken place. Both experts at trial testified that, in their opinion, defendant suffered from a mental illness and the jury found him guilty but mentally ill. While the experts disagreed as to whether defendant knew his actions were wrong and could control his actions, the jury chose to believe the prosecution's expert who based her opinion that defendant was in control and knew what he was doing on the victim's statement and description of the actions wherein she noted that he seemed to being "thinking hard," and held her down and muffled her screams. Therefore, defendant has not demonstrated a reasonable probability that the result of the proceedings would have been different had defendant's bond not been revoked.

Defendant also argues that he received ineffective assistance of counsel from Plunkett because it was clear that, on the eve of trial, Plunkett was not prepared to represent defendant at trial and had not prepared an insanity defense. While a lack of preparedness to go to trial can be ineffective assistance, when making such a claim, a defendant is required to show that the lack of preparation prejudiced him. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant's argument lacks merit because Plunkett did not represent him at trial and defendant's trial attorney was allowed additional time in which to prepare after taking over the case. Defendant does not assert that his actual trial counsel was unprepared. Therefore, even assuming that Plunkett was unprepared, defendant has not shown that he was prejudiced where his actual trial counsel requested and received additional time in which to prepare for trial.

Defendant also asserts that he received ineffective assistance of counsel from Plunkett because Plunkett failed to file the required notice, under MCL 750.520j(2), that defendant intended to question the victim about their prior sexual conduct and misinformed the police about defendant's clothes being washed so that testing was never completed on the clothes. We disagree.

MCL 750.520j(2) requires a defendant proposing to offer evidence of a victim's past sexual conduct with the defendant to file within ten days of arraignment a written motion and offer of proof regarding the proposed evidence. In this case, the trial court granted the prosecutor's motion to exclude this evidence based on the lack of the proper notice; however, the trial court changed its decision after the prosecutor referred to defendant wanting to have sex with the victim "one more time" in her opening statement and allowed defendant to cross-examine her about this previous sexual conduct. Defense counsel was then able to question the victim as to why she continued to talk to defendant after these relations and, amidst her refusal to rekindle their relationship, she admitted that defendant had never forced her to do anything before. Furthermore, defendant's expert testified as to portions of the victim's preliminary examination testimony, that he used in his diagnosis of defendant, and read a portion, which included questions to the victim about whether defendant had ever scared or threatened her in the past before having sexual relations with her. Therefore, the jury knew from previous testimony that the victim and defendant had dated for over two years and, because of defendant's cross-examination, knew that the two had been sexually intimate. While defendant argues that he was not allowed to elicit testimony from the victim regarding her desire to keep her sexual activity from her parents, this ignores the trial court's specific direction to defendant's trial counsel to request a hearing if he wished to pursue testimony outside the scope of its limitation. No such

request was made. Defendant has failed to show that he was prejudiced by Plunkett's failure to file the required notice.

Furthermore, defendant's argument that valuable evidence might have been lost because his clothes were never tested lacks merit. This argument ignores the fact that all of the victim's clothes were tested as were the swabs taken as a part of her rape kit and all of this evidence tested negative for semen. Logically, the absence of semen either in the victim or on her clothes supports the same argument that defendant makes; however, the jury also heard testimony that the absence of semen does not necessarily mean that a sexual assault did not occur. Given the evidence actually admitted in this case, defendant has failed to explain how he was prejudiced by this lack of testing.

Defendant finally argues that he received ineffective assistance of counsel from Plunkett because Plunkett misrepresented the time defendant might serve if he accepted the plea offer and communicated the offer to him only the night before trial. We disagree. Defendant argues that Plunkett told defendant that he would serve only two or three years in prison and that such advice is dangerously incompetent as defendant would realistically serve much longer if he pleaded guilty to two counts of third-degree CSC. However, defendant refused this offer and continued to trial under new representation; therefore, defendant has failed to show how this advice prejudiced him.

Defendant's claim that he was deprived of effective assistance of counsel because his trial counsel failed to object to the assertions of error addressed on appeal lacks merit because counsel is not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). As noted above, defendant has failed to show any prosecutorial misconduct, instructional error, or improper admission of evidence. Therefore, his trial counsel was not ineffective for failing to object to these assertions of error.

Next, defendant argues that he is entitled to resentencing because the trial court considered defendant's refusal to admit guilt during sentencing. We disagree. The trial court may consider evidence of a lack of remorse during sentencing; however, resentencing is required if it is apparent that the trial court erroneously considered the defendant's failure to admit guilt. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). Defendant cites *People v Wesley*, 428 Mich 708, 713-714; 411 NW2d 159 (1987), for the premise that an "indication" of the following three factors shows improper influence of defendant's refusal to admit his guilt in the trial court's sentence: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." However, our Supreme Court's analysis in *Wesley*, *supra* at 716, indicates that a request for the admission of guilt as well as an offer to lessen defendant's sentence in exchange for the admission are required to show an improper influence on the trial court of defendant's refusal to admit guilt. The trial court did not ask defendant to admit his guilt or offer him a reduced sentence in exchange for such an admission; rather, the trial court appropriately considered defendant's lack of remorse in determining his ability to be reformed. See, also, *Spanke*, *supra*.

Defendant next asserts that the trial court incorrectly scored OV 2, OV 10, and OV 13, and that, because of this incorrect scoring, defendant's sentence exceeds the correct guidelines range. We disagree.

As for OV 2, lethal potential of weapon possessed, the victim testified that defendant picked up a pair of scissors from her nightstand and held them to her, i.e., "the offender possessed" a "cutting or stabbing weapon." See MCL 777.32. Therefore, evidence supported the scoring of OV 2 at five points and the trial court did not abuse its discretion in scoring the offense variable accordingly.[1]

With regard to OV 10, exploitation of a vulnerable victim, the evidence clearly indicated that defendant gained access to and sexually assaulted the victim as a consequence of their former romantic relationship, and after the victim declined to resume that relationship. See MCL 777.40; see, also, MCL 750.81a(2). Therefore, the trial court did not abuse its discretion in scoring OV 10 at ten points.

And, regarding OV 13, continuing pattern of criminal behavior, the evidence clearly indicated that defendant committed three or more crimes against the victim within a five year period, i.e., the sentencing offenses. See MCL 777.43. Each forcible sexual penetration of the victim resulted in a separate conviction pursuant to the plain language of the statute and relevant case law. MCL 750.520b; *People v Dowdy*, 148 Mich App 517, 521; 384 NW2d 820 (1986) (legislature intended to punish each criminal sexual penetration separately). Therefore, the trial court did not abuse its discretion in counting each offense as part of defendant's pattern of criminal behavior and scoring OV 13 at twenty-five points. In sum, OV 2, 10, and 13 were scored correctly; thus, defendant's sentence is within the appropriate guidelines range and this issue is without merit.

We decline to address defendant's remaining issues because he has failed to properly address their merits and, therefore, has abandoned them. See *Kelly*, *supra*.

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[1] Defendant argues that, pursuant to *Blakely v Washington*, 542 US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the trial court erred in considering facts not found by the jury in scoring OV 2 and OV 10. However, *Blakely* does not apply to Michigan's sentencing guideline system. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).